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No. 84-101

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

BRONTEL, LTD., et al.,

Petitioners,

vs.

THE CITY OF NEW YORK, et. al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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September 11, 1984

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QUESTION PRESENTED

Whether the District Court properly dismissed, and the Court of Appeals properly affirmed dismissal of the complaint which alleges, inter alia, that (1) New York City's Rent Control Laws violate the Sherman Antitrust Act, 15 USC §1 et seq., and (2) New York City breached a proposed settlement contract.

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STATEMENT OF THE CASE

A. History of the Proceedings Below

In 1975 and 1976, petitioners acquired three New York City properties which have been the subject of litigation in the state and federal courts

since 1977. During the entire period of litigation petitioners have not paid any of the taxes assessed on those properties (7-a).*

Petitioners' original complaints in this federal action alleging violations of the United States Constitution and 42 USC §1983, were filed on April 26, 1982 (JA7-20). Respondents' time to answer was extended by stipulation "so ordered" by Judge Weinfeld, until after the Second Circuit rendered a decision in the related case of Friarton Estates Corp. .. City of New York, 681 F2d 150 (1982).** Following Friarton, respondents moved pursuant to Fed. R. Civ. P. 12(b)(6) and 56 to dismiss the action for failure to state a claim and on grounds of res judicata and collateral estoppel (JA43-44).

*Unless otherwise indicated, numbers in parentheses followed by "-a" are references to the Appendix to the Petition for Certiorari; numbers in parentheses preceded by "JA" are references to the Joint Appendix filed in the Circuit Court.

**The Friarton decision is discussed infra in the context of the District Court's decision in this action.

Thereafter, the actions were discontinued by a "so ordered" stipulation pending settlement discussions (JA47-48).

On September 21, 1982, respondents wrote to petitioners concerning the proposed settlement (JA231-232). The letter, which incorporated the understandings of the parties, stated that petitioners must withdraw the pending federal actions, with prejudice, in exchange for, inter alia, respondents' counsel's recommendation to the Board of Estimate to approve petitioners' applications for redemption of the subject properties (JA231, 235-236), which due to petitioners' continued failure to pay any assessed taxes, (not even the amount due based upon their own estimate of the fair valuation of the properties), had been seized in in rem foreclosure proceedings.* Petitioners never accepted respondents' terms of settlement (JA236).

*One property had been demolished pursuant to a New York State Supreme Court order (JA201-203).

Upon failure of settlement efforts, petitioners moved to restore the actions to the calendar and to amend the complaints pursuant to Fed. R. Civ. P. 15 (JA49). The motion was granted on consent by orders dated April 5, 1983 (JA106-7). Respondents then renewed their motions to dismiss (JA108-112). Thereupon petitioners cross-moved in August, 1983 to file an amended and consolidated complaint and for a preliminary injunction* against the City to prohibit respondents from taking any further action regarding the properties and to compel respondents to process petitioners' applications to redeem its properties (JA113-115). The amended complaint alleged in addition to violations of Section 1983, breach of the Sherman Act, 15 USC §1 et seq., impairment of the obligations of contract, unlawful refusal to permit redemption of properties, breach of an alleged settlement contract and tortious

*After oral argument on the preliminary injunction motion, Judge Weinfeld denied the motion as "utterly lacking in substance" (JA262).

destruction of property (JA140-165). The City opposed the cross-motion to amend on all grounds and reiterated that the complaint should be dismissed pursuant to R. 12(b)(6).

By decision dated September 23, 1983, Judge Weinfeld of the United States District Court for the Southern District dismissed plaintiffs' federal claims for failure to state a claim and dismissed the "state law, contract and abuse of discretion claims" upon declining to exercise pendent jurisdiction (7-a - 37-a). The United States Court of Appeals for the Second Circuit affirmed the District Court judgment on April 13, 1984 (1-a - 4-a).

B. Decisions Below*

Preparatory to discussing the effect of res judicata, the District Court reviewed the "long and convoluted" prior state and federal court litigation

*The District Court opinion is reported at 571 F Supp 1065 (S.D.N.Y., 1983) and is reproduced in the Appendix to the Petition starting at page 7-a.

of petitioners (12-a). The state action began in 1977 when the City moved to foreclose on all tax delinquent properties including that belonging to petitioners. Petitioners denied that they had failed to pay any "lawfully assessed" taxes and asserted in counterclaims that the City's rent control laws amounted to an unconstitutional taking without just compensation and that the properties could not be foreclosed pending a determination of the legality of the assessment in tax certiorari proceedings. Petitioners' properties were severed from the main in rem action and petitioners' joined with Friarton Estates and others in seeking to consolidate the foreclosure action with the tax certiorari actions. In August, 1979, Justice Martin Evans partially granted petitioners' motion to amend the answer.

The answers as amended retained the counterclaim charging that the City's rent control laws were unconstitutional, and alleged as an affirmative defense that it would be inequitable to foreclose the properties while tax certiorari proceedings were pending, and a denial of due

process to allow the City to proceed with its in rem foreclosure actions absent a consolidation of their pending certiorari proceedings. Ultimately, Justice Evans denied consolidation of the foreclosure and certiorari actions, severed petitioners' counterclaim regarding constitutionality of rent control, and granted the City's motion for summary judgment on the foreclosure actions (14-a - 15-a).

Petitioners and Friarton appealed to the Appellate Division, which affirmed without opinion [79 AD2d 899 (1980)], and further appealed to the Court of Appeals, which dismissed the appeal for lack of a "substantial constitutional question [53 NY2d 795 (1981)] (17-a). A petition to this Court for a writ of certiorari was denied [454 US 837 (1981)] (18-a).

Judge Weinfeld then summarized the prior federal court litigation as follows (18-a - 20-a):

> Friarton then filed an action in the Southern District of New York with respect to the eight properties it had owned. It sought an injunction against enforcement of

> the foreclosure judgments until the state tax certiorari proceedings had been concluded, and damages for alleged violations of its constitutional rights. The District Court granted a preliminary injunction; [footnote omitted] the Second Circuit reversed, holding that Friarton's constitutional claims were barred by the res judicata effect of the state court proceedings [footnote omitted].
>
> In April, 1982, after argument of the appeal, but before the Court of Appeals handed down its decision, plaintiffs, who had not joined the Friarton action, brought this action, seeking the same relief Friarton had sought. When the City moved to dismiss plaintiffs' initial complaint in this action, plaintiffs applied for and were granted leave to serve an amended complaint, which contained antitrust, takings, tort and contract claims.

Turning to the City's res judicata defense, Judge Weinfeld determined that regardless of whether petitioners characterize their claims as "inverse condemnation" or taking without just compensation, their argument that the City unconstitutionally foreclosed upon their properties without affording them an adequate opportunity to

challenge the tax assessments "were presented to, and passed upon by, the New York State trial and appellate courts" (20-a -21-a). Quoting Judge Friendly's statement in Friarton, that the record in the state court litigation in which petitioners were parties " 'leaves no room for doubt that the claims of lack of due process and taking of property without just compensation were fully presented to the New York courts, and that those courts entertained them but denied them on the merits' ", Judge Weinfeld reached the same conclusion and dismissed those claims as barred by res judicata (20-a - 25-a).

Turning to petitioners' antitrust claims,* the Court found that under the rule articulated in Parker v. Brown, 317 US 341 (1943) and developed in

*Judge Weinfeld chose to dismiss the antitrust claim on the merits, while recognizing that there might be "some substance" to the City's contention that this claim was barred by the collateral estoppel effect of the Friarton federal litigation since petitioners "assumed control over" this litigation (citing Montana v. United States, 440 US 147 [1979]).

Lafayette v. Louisiana Power and Light Co., 435 US 389 (1978) and Community Communications Co. v. Boulder, 455 US 40 (1982), the City's control of residential rents was exempt from antitrust considerations, holding (28-a - 29-a):

> The City's rent control regulations are in furtherance or implementation of clearly articulated and affirmatively expressed state policy, and thus come within the Parker exemption. New York's Local Emergency Housing Rent Control Act, adopted in 1962, specifically states that the "legislature hereby finds that a serious public emergency continues to exist in the housing of a considerable number of persons in the State of New York," and that "the transition from regulation to a normal market of free bargaining between landlord and tenant, while still the objective of state policy, must be administered with due regard for such emergency". Accordingly, that Act gives New York City (and some other cities in the state) the authority to determine whether rent control is necessary, and to adopt and administer local laws or ordinances regarding the regulation and control of rents [footnote omitted].

In addition, the Court recognized that the Rent Control Act exempted City owned or operated

housing from its regulations. Thus, the City's rent control program which is subject to active state supervision as "evidenced by the legislature's repeated extension of the expiration date of state rent control laws" is absolutely exempt from antitrust challenge.

Next, the Court dismissed petitioners' charge that rent control and other regulations impair the obligation of contracts, finding that the constitutionality of such regulations was "well established" (33-a).

Regarding the remaining state law claims, the Court declined to exercise pendent jurisdiction. At most, the Court held that petitioners' claims amount to allegations of abuse of discretion by the Board of Estimate in refusing to consider their applications for redemption of their property and a breach of an alleged settlement agreement. Whatever the facts, the Court stated, those issues were more properly for state courts to decide, and in the exercise of discretion declined to exercise pendent jurisdiction (36-a).

Lastly, the Court rejected petitioners' tort claim for wrongful destruction of their building in May, 1983 because, the Court held, the City had owned the building since August, 1981 (37-a).

The United States Court of Appeals for the Second Circuit affirmed the District Court judgment, "substantially for the reasons given in the district court's opinion" (3-a).

REASONS FOR DENYING THE WRIT

PETITIONERS HAVE FAILED TO SET FORTH SPECIAL OR IMPORTANT REASONS FOR GRANTING A WRIT OF CERTIORARI IN THIS MATTER.

Petitioners seek this Court's review on the ground that the Courts below granted the City "absolute immunity" from the Sherman Antitrust Act, and argue that, accordingly, the lower Courts' decisions are in conflict with the holdings of other circuits regarding state action immunity. However, petitioners misread the lower Courts' decision

which, as set forth infra, are in complete accordance with this Court's holdings on state action immunity. Thus, the purported conflict simply does not exist. Moreover, it is submitted that even if the findings of the Courts below were improper, petitioners have failed to raise any issue which warrants review by this Court.

A. The City's Rent Control Regulations Are Implemented Pursuant to an Explicit Oft Repeated State Policy to Control Residential Rents. Therefore, the City's Actions Fall within the State Action Exemption to the Antitrust Laws.

1. State Action Immunity was properly fround.

Petitioners' argument to this Court speculates, at length, as to the purported effects the City's Rent Control Regulations will have on the rental housing market in the City. Such speculation is presented, however, to obfuscate petitioners' fundamental problem throughout this litigation, that the City's Rent Control Regulations implement a "clearly articulated and affirmatively expressed

state policy," which pursuant to this Court's holding in Parker v. Brown, 317 US 341 (1943) exempt those regulations from the federal antitrust laws.

That such exemption was appropriately granted in this case is illustrated by the fact that not only is the City's action in response to a "clearly articulated and affirmatively expressed state policy", but it is also now subject to "active state supervision." Thus, under any reading of this Court's holdings concerning antitrust exemptions, petitioners' claim that the City's rent control program is illegal must fail.

The Local Emergency Housing Rent Control Act of 1962 (McKinney's Unconsolidated Laws, Section 8601 et seq.) authorized the City of New York to determine whether rent control should continue in the City and further provided that rent control regulation should be exercised by the City of New York. Since 1962, the City of New York has enacted legislation to continue rent control, now

codified as Title Y, Section Y51-1.0 et seq., of the Administrative Code of the City of New York.*

*The New York City Rent Control Law has most recently been upheld in Benson v. Beame, 50 NY2d 994 (1980) app. den. 449 US 1119 (1981).

The New York Court of Appeals stated:

> Plaintiffs attack the New York City Rent Control Law on the grounds that there is no longer any emergency after 36 years, that as applied it is confiscatory, and that in any event there has been such a failure of administration of the law as to mandate its being declared unconstitutional. The need for rent control has been re-examined legislatively at intervals of three years, the most recent such review being the March 27, 1980 Report of the New York State Temporary Commission on Rental Housing, which concluded that "There is a need for continuing a form of rent regulation in those jurisdictions in which housing accommodations are presently subject to rent control or rent stabilization." Whether there is need for controls is a matter of legislative determination in the first instance. The presumption of a factual basis for that determination is not overcome by

(Footnote continued on next page)

The State and City of New York have determined that a public housing emergency exists, which requires the enactment of comprehensive statutory and regulatory methods for regulation of residential rents in New York City. As set forth at section 8602 of the Unconsolidated Laws of the State of New York (Local Emergency Housing Rent Control Act):

> The legislature hereby finds that a serious public emergency continues to exist in the housing of a considerable number of persons in the State of New York which emergency was created by war, the effects of war and the aftermath of hostilities; that such emergency necessitated the intervention of federal, state and local

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(Footnote continued from previous page)

> mere passage of time, nor have plaintiffs, whose affidavits concentrate on the effect of controls on property owners, presented evidence to demonstrate beyond a reasonable doubt that there is no factual basis. 50 NY2d at 995, 996.

> government in order to prevent speculative, unwarranted and abnormal increases in rents; that there continues to exist an acute shortage of dwellings; that unless residential rents and evictions continue to be regulated and controlled, disruptive practices and abnormal conditions will produce serious threats to the public health, safety and general welfare; that to prevent such perils to health, safety and welfare, preventive action by the legislature continues to be imperative; . . .

Moreover, as the District Court further found, section 8605 of the Act mandates that City owned and operated housing is exempt from rent control. These statutory provisions definitively establish that "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of." Lafayette v. Louisiana Power & Light Co., 435 US 389, 415 (1978). Further, even employing the standard as refined in Community Communications Co. v. Boulder, 455 US 40 (1982), that the municipal action is exempt from antitrust scrutiny only if it is "the action of the State ... itself in its sovereign

capacity" (Id. at 52), and assuming that the open question in Boulder, "whether active state supervision is necessary for municipal exemption" is answered affirmatively, the District Court properly determined that the municipal activity was absolutely immune. The New York State Legislature's repeated extensions of the expiration date of the rent control laws establish that such controls are state policy. See, Act of July 27, 1982, Ch. 845, N.Y. Laws.

Most recently, the 1983 Emergency Tenant Protection Act, signed into law on June 30, 1983, provided for the administration of Rent Control to be assumed by the State as of April 1, 1984. A fortiori, the administration of rent control by the City falls within the Parker "state action" immunity from coverage by the Antitrust Law and a complaint based on this statute was properly dismissed pursuant to Rule 12(b)(6).

Furthermore, the distinction petitioners attempt to draw based upon the contention that in regulating rents, the City is acting in a proprietary

function and not a traditional governmental function (see Petition, pages 20-24), totally lacks merit. It is clear from the decisions below that the City was not given a "per se" exemption, which is what triggered the Chief Justice's concern in City of Lafayette v. Louisiana Power and Light Co., 435 US at 422, when he drew such a distinction in his concurring opinion. Here, where the state policy regarding rent control is clearly articulated and the State has assumed control over administration of Rent Control, an exemption from the federal antitrust laws is clear.

2. The lower Courts' decisions do not conflict with those of other circuits.

Contrary to petitioners' argument, none of the cases cited in their petition are in conflict with the lower Courts' decisions, nor do the cited cases rely upon the proprietary/governmental distinction for the purpose of finding the challenged municipal action subject to the federal antitrust laws. Indeed, the cases cited by petitioners rely upon the more authoritative reasoning that the challenged actions

were not pursuant to a "clearly articulated and affirmatively expressed state policy," nor was there any indication of "active state supervision."* As shown supra at pages 13 through 18, the challenged action here is clearly pursuant to the expressed state policy of the need for regulation of the rental housing market in New York City, and, in fact, that regulation is now administered by New York State. Thus, the purported conflict simply does not exist; petitioners have failed to present any persuasive authority supporting their position that the Rent Control program is not entitled to state action immunity from the federal antitrust laws.

*Indeed, in Parks v. Watson, 716 F2d 646, 663-664 (9th Cir., 1983), the Court denied immunity on the ground that although the State's legislation allowed the municipality to establish its own geothermal district, it did not provide that the municipality could regulate or exclude privately owned districts, and found no such implication in the legislation. Similarly, an exemption was denied in Carey v. Cook, 641 F2d 32, 37 (1st Cir., 1981), because the Court found no explicit or implicit intention, in legislation which gives the public authority power to license new entrants to the ferry market, to allow the authority or town to regulate the parking lot market.

B. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN REFUSING TO EXERCISE PENDENT JURISDICTION OVER THE SPECIOUS BREACH OF CONTRACT CLAIM.

In United Mine Workers v. Gibbs, 383 US 715, 726 (1966), this Court advised that "if the federal claims are dismissed before trial, even though not unsubstantial in a jurisdictional sense, the state claims should be dismissed as well." Here, having determined that petitioners' main claims were barred by res judicata and after dismissing their antitrust allegation pursuant to Rule 12(b)(6), the District Court had no reason to consider claims which raised only state law issues. On the contrary, to have exercised jurisdiction might be considered an abuse of discretion. Nolan v. Meyer, 520 F2d 1276, 1280 (2d Cir., 1975), cert. den., 423 US 1034.

Petitioners, who do not even refer to a signed settlement agreement, argue that by refusing to exercise pendent jurisdiction, "the courts below limited the scope of jurisdiction under 28 U.S.C. §1331 in a way that could result in inhibiting

settlements and their effectuation in federal litigation" (Petition, p. 33), and further argue that this result of the lower Courts' holdings conflicts with rulings in other circuits. However, none of the cases cited in their petition at pages 33-35 support their argument; indeed, the decision in Fairfax Countywide Citizens' Association v. Fairfax County, 571 F2d 1299, 1303 (4th Cir.,), cert. den., 439 US 1047 (1978) contradicts petitioners' argument and holds that the district court is not empowered to enforce a settlement agreement "unless the agreement had been approved and incorporated into an order of the court, or at the time the court is requested to enforce agreement, there exists some independent ground upon which to base federal jurisdiction." Here, no such predicate exists. Thus, declining jurisdiction was an appropriate exercise of the District Court's discretion. In conclusion, petitioners have simply failed to raise an issue which merits review by this Court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

September 11, 1984.

Respectfully submitted,

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